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No. 92-1273

IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

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SOUTHVIEW ASSOCIATES, LTD.,
SOUTHVIEW AT STRATTON PARTNERS,
*Petitioners*

v.

INDIVIDUAL MEMBERS OF THE VERMONT ENVIRONMENTAL BOARD; FERDINAND BONGARTZ, LIXI FORTNA, ARTHUR GIBB, SAMUEL LLOYD, WILLIAM MARTINEZ, CHARLES STORROW, STEVE WRIGHT, and the CHAIRMAN OF THE ENVIRONMENTAL BOARD, ELIZABETH COURTNEY,
*Respondents*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## REPLY BRIEF FOR PETITIONERS

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF FOR PETITIONERS

Although much of Respondents' Brief is conclusory and does not warrant reply, several of the arguments advanced by Respondents evidence a fundamental misunderstanding of constitutional principles which have been established by this Court, but which have been abridged or largely ignored by Respondents and by the Court of Appeals. Left uncorrected, the direction in which the decision of the Court of Appeals below leads takings jurisprudence will only result in more confusion, more controversy, and the further erosion of constitutionally-protected property rights.

## POINTS IN REPLY

### I. *WILLIAMSON* REQUIRES BOTH "A REASONABLE, CERTAIN AND ADEQUATE MEANS OF COMPENSATION" AND COMPENSATION ITSELF TO SATISFY THE DUE PROCESS AND JUST COMPENSATION REQUIREMENTS OF THE FIFTH AMENDMENT.

Respondents' assertion, that "no constitutional violation occurs until just compensation has been denied", Pet. Brief at 12, reads too little and too much into the Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). It is evident that neither Respondents nor the Court of Appeals recognize that the Court, in *Williamson,* establishes a two-part analysis to determine whether the Just Compensation clause has been satisfied. The *Williamson* analysis begins with a determination of whether a "'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking", *id.* at 194, to compensate the property owner whose property has been taken. Only when it is determined that a "reasonable, certain and adequate provision" for obtaining compensation has been provided does the analysis turn to whether compensation has, in fact, been paid. Only then does the Court in *Williamson* conclude that "the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195. Although not expressly stated in its decision, it is evident that the Court, in *Williamson*, viewed the Just Compensation clause as having both a substantive component and a procedural component; substantive to the extent that a "reasonable, certain and adequate" means of obtaining compensation must be provided, procedural to the extent that the property owner who has suffered a taking must

seek compensation in accordance with such procedures. The availability of a "reasonable, certain and adequate" procedure to obtain compensation is as important to the concept of Just Compensation as the compensation itself[1].

The Court's decisions in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, 482 U.S. 304 (1987) and *Williamson*, and the Vermont Supreme Court's decision in *Foster v. Stafford Nat'l Bank*, 57 Vt. 128, 5 A. 890 (1894), are easily reconcilable and clearly consistent with respect to the substantive and procedural components of the Williamson analysis. In *Williamson*, the Court required that compensation must be provided pursuant to a reasonable, certain and adequate procedure. Although *Williamson* tells us that a taking has not occurred until compensation has been denied, the Court in *First English* concludes that, under the self activating character of the Just Compensation clause, no property owner whose property has been taken can be

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[1] In their Brief, Respondents state that "[a]t no time did Southview ever argue below that Vermont's alleged failure to provide a process was itself a denial of "Due Process and Just Compensation." Resp. Brief at 10. Not only do Respondents misstate the record (*see, e.g.*, Pet. App. F22, ¶101), they ignore this Court's pronouncement in *Yee v. City of Escondido*, 118 L. Ed. 2d 153 (1992) that "it is the petitioner himself who controls the scope of the question presented. The petitioner can generally frame the question as broadly or as narrowly as he sees fit." *Yee*, 118 L. Ed. 2d at 170. From the filing of the Complaint to the filing of the Petition, Petitioners have consistently and steadfastly maintained that Respondents actions have deprived them of their substantive Due Process rights guaranteed under the Fifth Amendment. It is Respondents' fundamental misunderstanding of the constitutional concept of substantive Due Process, and not any defect in Petitioners' pleadings, which appears to confuse Respondents about the nature of Petitioners' claims.

denied compensation[2] (assuming that the governmental action does not come within the nuisance exception addressed by this Court in *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d 798 (1992)). It is evident that *Williamson's* reference to a 'denial of compensation' which would give rise to a taking is not necessarily limited to a procedural denial of compensation, since a procedural denial of compensation could not occur under the Court's rationale in *First English*. Read together, *Williamson* and *First English* establish that the failure to provide a reasonable, certain and adequate means of compensation is the effective equivalent of a substantive denial of compensation, and a substantive violation of the rights guaranteed to Petitioners under the Fifth Amendment. *Williamson* and *Foster* are in complete accord; *Foster* effectively

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[2] While *First English* is often relied upon for the proposition that compensation, not invalidation, is the appropriate remedy for a regulatory taking, it is evident that the Court in *First English* did not intend to preclude invalidation as a remedy for a constitutionally-defective law or act. *First English*, 482 U.S. at 319. While, as Respondents observe, "[i]f Vermont's administration of Act 250 results in a taking, Vermont may choose to pay just compensation. Or, Vermont may choose to limit Act 250 so as never to cause a taking", Resp. Brief at 14, Vermont need only make its choice "[o]nce a court has determined that a taking has occurred". *First English*, 482 U.S. at 321. Petitioners are asking the Court to make the constitutional determination that Respondents' actions in this case have resulted in a taking of Petitioners' property in violation of both the Due Process and Just Compensation provisions of the Fifth Amendment. Once that determination has been made, Vermont must then make its election with respect to any future application of Criterion 8 of Act 250 to the Southview Property.

applies the *Williamson* analysis by striking down as constitutionally defective a state law which results in a taking but does not provide a 'reasonable, certain and adequate' means of compensation.[3]

The Court of Appeals, in its decision below, confirms that no statutory compensation remedy for Respondents' taking of Petitioners' property exists under Vermont law. Instead, the Court of Appeals and Respondents maintain that Article 2 of the Vermont Constitution provides to Petitioners whatever "remedy" is available under Vermont law. *Foster* tells us, however, that in Vermont, the remedy for a law which effects a taking of property but does not provide a compensation remedy is invalidation, not compensation, and neither Judge Oakes nor Respondents offer any contrary authority.[4]

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[3] Petitioners do not contend that the Vermont Supreme Court, in *Foster*, was clairvoyant and anticipated the Court's decision in *Williamson*, only that the constitutional premise upon which the "century old" *Foster* decision was based is entirely consistent with the modern view of this Court in *Williamson*.

[4] While, as Respondents observe, *Foster* is a "century old" case, neither Respondents nor the Court of Appeals cite any authority which indicates a modification of the court's decision in *Foster* that "any legislative act authorizing . . . an appropriation [of private property] . . . which does not provide for compensation, is plainly in conflict with the Constitution." *Foster*, 57 Vt. at 133, 5 A. at 895. Respondents' citation to *Eno v. City of Burlington*, 125 Vt. 8, 209 A.2d 499 (1965), as authority for the proposition that "the common law provides the machinery to secure full vindication of rights provided by the Vermont Constitution", Brief at 12, conveniently overlooks the fact that the reference in *Eno* to the availability of "common law machinery" refers specifically and exclusively to remedies available under § 28 of Chapter II of the Vermont Constitution (relating to access to the courts). *Eno*, 125 Vt. at 16, 209 A.2d at 506. Nothing in *Eno* suggests any intent to modify the Court's holding in *Foster*, that it was unnecessary "to decide whether, upon the facts stated, the use for which the orator was authorized to appropriate the property, was public

Accordingly, no compensation is available to Petitioners under Vermont law, and both *Foster* and *Williamson* mandate the invalidation of Respondents' application of Criterion 8 of Act 250 to future applications for development of the Southview Property.

## II. PETITIONERS' FILING OF A STATE COURT COMPENSATION CLAIM DOES NOT RENDER THIS PETITION MOOT.

Respondents argue that the filing by Petitioners of a compensation claim in the Vermont Superior Court somehow renders moot the continuation of Petitioners' action to enjoin Respondents' unconstitutional application of Criterion 8 of Act 250. What Respondents steadfastly refuse to acknowledge, however, is that, for almost eight years, Respondents' actions have deprived Petitioners of their constitutionally-protected property rights in violation of both the Due Process and Just Compensation provisions of the Fifth Amendment. In their federal court complaint, Petitioners have sought invalidation of Respondents' application of Criterion 8 of Act 250, however, "[i]nvalidation . . . after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." *First English*, 482 U.S. at 319. Petitioners have brought their state court compensation claims against Respondents not pursuant to any state compensation remedy (since no such remedy exists), but under the "self-executing character of the constitutional provision with respect to compensation", *id.* at 315, to recover compensation for the effects of Respondents' unconstitutional application of Criterion 8 of Act 250.

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use or not; as the failure to make compensation or to give such security for its payment, as the law requires, rendered the act unconstitutional." *Foster*, 57 Vt. at 134, 5 A. at 896. *Foster* may be <u>old</u> law, but it is <u>good</u> law!

It is Petitioners' hope and belief that this Court will grant their Petition and determine that the actions of Respondents have resulted in a constitutionally impermissible taking of Petitioners' property. Time is passing, however, and to avoid any argument by Respondents that Petitioners have failed to perfect their compensation claims against Respondents within applicable statutes of limitation, Petitioners filed their state court compensation claim in anticipation of a decision of this Court.[5] While the filing of the State court action by Petitioners may appear to the Court to be presumptuous, Petitioners submit that, under the circumstances of this case, the decision to file their State court claims prior to a decision by this Court was simply prudent.

Here, the relief sought by Petitioners is exclusively declaratory and injunctive in nature, and is of an entirely different character than Petitioners' state court compensation claim. Petitioners seek from this Court a determination that the actions of Respondents are constitutionally impermissible. Such a determination will make the state court compensation claim filed by Petitioners "a living and not a hypothetical controversy." *Collins v. Porter*, 328 U.S. 46, 49 (1946). While, as the Court observes in *Collins*, it is "powerless to decide a case if its decision 'cannot affect the rights of the litigant before it'", *id.* at 48, here, as in *Collins*, a decision by the Court on Petitioners' claims will clearly "affect the rights" of Petitioners and Respondents.

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[5] It is noteworthy that Petitioners and Respondents have, by agreement, advised the state court in which the compensation claim was filed to stay any further action on the state court compensation claim until this Court makes a determination with respect to this Petition.

## III. PETITIONERS' CLAIMS ARE NOT BARRED BY THE ELEVENTH AMENDMENT.

The record of this case, the decision of the Court of Appeals and the Brief of Respondents leave no doubt that any Act 250 Permit for any future development of the Southview Property will require the applicant to forego any development which might exclude deer from the Southview Property. Moreover, as the record clearly demonstrates, any future development of the Southview Property requiring an Act 250 permit will only be approved by Respondents for the portion of the Southview Property other than the 44 acres of deeryard.

Petitioners' claims for declaratory and injunctive relief against Respondents, to prevent them from acting in their official capacity and under color of State law to deprive Petitioners of their constitutional rights, have long been recognized by this Court as appropriate and consistent with the Eleventh Amendment. In *Ex Parte Young*, 209 U.S. 123 (1908), the Court held that "individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten . . . an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Id.* at 155-56. Here, as in *Ex Parte Young*, Respondents have acted (and have evidenced their intent to continue to act) in their official capacity, as members of the Vermont Environmental Board, to apply Criterion 8 of Act 250 to prevent any development which would cause the deer to be excluded from the Southview Property, and to require that half of the Southview Property be maintained in its natural state as a condition of the development of any other portion of the Southview Property.

In their brief, Respondents, relying on *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), contend that the Eleventh Amendment requires that Vermont retain the "sovereign right to . . . administer its own laws", Resp. Brief at 14, and assert that Petitioners' action seeks to "instruct[] state officials on how to conform their conduct to state law". *Id.* at 106[6]. The Court in *Pennhurst*, however, recognized an important exception to this general rule: that "a suit challenging the constitutionality of a state official's action is not one against the State", *id.* at 102, and observed that while "[t]his rationale . . created the 'well recognized irony' that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment . . . [t]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the 'supreme authority' of the United States." *Id.* at 104-05. Here, Petitioners seek only to have Respondents conform their conduct to the Federal Constitution, under principles established by this Court in *First English, Loretto, Williamson, Nollan* and *Lucas*.

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[6] In their Brief to the Court of Appeals, Respondents maintain that the "Eleventh Amendment precludes a federal court from instructing a State on the interpretation and administration of State law in the absence of a constitutional infirmity." (Defendants' Brief at 39-40) It is the constitutional infirmity of Respondents' actions which is central to this case and which distinguish Petitioners' claims from claims which might otherwise contravene the Eleventh Amendment, and the only "instruction" which Petitioners seek is to have Respondents comply with the Federal Constitution.

## CONCLUSION

For the reasons cited in the Petition and this Reply Brief, the Petition for a Writ of Certiorari should be granted.

DATED: March 5, 1993

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